The Role of Lochner in the Health Care Litigation

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JURIST Guest Columnist **David Bernstein** of George Mason University School of Law, an adjunct scholar at the **Cato Institute**, argues that striking down the individual mandate of the health care reform legislation does not implicate a resurgence of the notorious 1905 Supreme Court decision in *Lochner v. New York*...

With the US Supreme Court poised to decide whether the **Affordable Care Act's** (ACA) individual mandate is unconstitutional, the ghost of the notorious 1905 Supreme Court decision in **Lochner v. New York** hovers over the case. Invalidate the mandate and you are resurrecting Lochner, legal briefs supporting the government argue.

Yet the holding in *Lochner*, which found that the Due Process Clause of the **Fourteenth Amendment** protects a robust right to "liberty of contract," was overruled decades ago and is not at issue in the health care litigation. Plaintiffs have challenged the individual mandate primarily as being beyond Congress's **Article I, Section 8** power to regulate interstate commerce. They argue that this power must have substantive limits, or the Constitution would have simply given Congress the power to regulate everything.

So why are defenders of the mandate so eager to talk about *Lochner*? The answer lies in the peculiar status of *Lochner* in American constitutional discourse.

Before the New Deal, various constitutional provisions and doctrines limited the scope of government power to regulate the economy. These included the **Contracts Clause**, the **Commerce Clause**, the **nondelegation doctrine**, the **Tenth Amendment**, the **Eleventh Amendment**, and the liberty of contract doctrine.

In the 1930s and 1940s, however, the US faced two of its greatest crises, the Great Depression and World War II. The government responded by growing exponentially with strong support from both public opinion and the intellectual elite. Under the circumstances, it's no surprise that the Court retreated from virtually all of its anti-regulatory precedents.

By the time normal conditions returned, the Supreme Court was dominated by pro-New Deal justices. President Franklin Roosevelt appointed them precisely because they could be counted on to uphold the government's new powers. These justices had no desire to reconsider, much less resurrect, pre-New Deal constitutional doctrines.

Academic opinion, meanwhile, favored the New Deal constitutional revolution so unreservedly that the old doctrines seemed nonsensical to a new generation of historians and law professors. Conventional wisdom soon held that the doctrinal differences between the various cases limiting government authority were just a rhetorical smokescreen for the Court's desire to impose a laissez-faire, Social Darwinist ideology on the American people. (Modern historians, who no longer feel the need to justify well-established New Deal legislation, detect no influence of Social Darwinism on any of the Court's controversial opinions, acknowledge that the Court upheld the vast majority of the novel laws that came before it, and take the Court's doctrinal justifications for its decisions seriously.)

For a variety of reasons, including mere happenstance, *Lochner* eventually became the shorthand for the pre-New Deal Court's purported malfeasance. For decades, liberal jurists have argued that the revival or development of any constitutional doctrine that limits economic regulation would herald a return to the so-called "*Lochner* era." With conservatives in control of the Court for the last two decades, liberal justices have attacked their colleagues for aping *Lochner* in cases that invoked the First Amendment, the Commerce Clause, the **Takings Clause**, the Tenth Amendment, and the Eleventh Amendment to limit the government's regulatory authority.

Ironically, meanwhile, the liberal justices themselves have expanded the scope of the Due Process Clause — the clause actually relied upon in *Lochner* — on behalf of the Progressive agenda. For that very reason, conservatives accuse their liberal adversaries of being the true heirs to Lochner.

It is unsurprising then that many of the individual mandate's defenders want to analogize the plaintiff's challenge to *Lochner*. Simon Lazarus, a prominent ACA defender, bizarrely argues that invalidating the mandate would "restore Lochner — letter, spirit, the whole nine yards."

In the end however, the individual mandate's fate will turn on whether the Supreme Court's conservative majority is willing to hold, against the great weight of textual and historical evidence, that the Commerce Clause gives the federal government virtual plenary power over the economy. And that has nothing to do with Lochner.

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